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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 PAUL MISKEY,

8 Plaintiff(s),

Case No. 2:19-CV-27 JCM (VCF)

9 v.

ORDER

10 ANDREW SAUL,

11 Defendant(s).

12
13 Presently before the court is Magistrate Judge Ferenbach's report and recommendation
14 ("R&R"). (ECF No. 22). Paul Miskey ("plaintiff") filed an objection (ECF No. 26), to which
15 Social Security Commissioner Andrew Saul¹ ("defendant") responded (ECF No. 27).

16 Also before the court is plaintiff's motion for reversal. (ECF No. 13). In lieu of a
17 response, defendant filed a motion to remand (ECF No. 17), to which plaintiff replied (ECF No.
18 19). Much to plaintiff's chagrin (*see* ECF No. 26), defendant filed a reply to plaintiff's reply
19 (ECF No. 21).

20 **I. Background**

21 The parties do not object to the factual presentation in the R&R. Therefore, the court
22 adopts the factual representation in the R&R and will detail factual and procedural background in
23 the discussion section of this order as necessary to explain the court's holding.

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27 ¹ Nancy Berryhill was the named defendant while she was Acting Commissioner of the
28 Social Security Administration. (*See* ECF Nos. 1; 6). Andrew Saul is now the Commissioner of
Social Security and was automatically substituted as a party pursuant to Fed. R. Civ. P. 25(d).
(ECF No. 17).

1 **II. Legal Standard**

2 A party may file specific written objections to the findings and recommendations of a
3 United States magistrate judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
4 LR IB 3-2. Where a party timely objects to a magistrate judge’s report and recommendation, the
5 court is required to “make a *de novo* determination of those portions of the [report and
6 recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1). The court “may accept,
7 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.”
8 *Id.*

9 Pursuant to Local Rule IB 3-2(a), a party may object to the report and recommendation of
10 a magistrate judge within fourteen (14) days from the date of service of the findings and
11 recommendations. Similarly, Local Rule 7-2 provides that a party must file an opposition to a
12 motion within fourteen (14) days after service thereof.

13 **III. Discussion**

14 There are three issues in this case: (1) whether plaintiff’s entitlement to widower’s
15 benefits is with or without a government pension offset (“GPO”); (2) if he is subject to a GPO
16 and was consequently overpaid, whether plaintiff is “without fault” for the overpayment; and (3)
17 if plaintiff is “without fault,” whether it would be against equity and good conscience to recover
18 that overpayment.

19 Claimants who receive “periodic payments based on his or her own employment in the
20 Federal Government, State or political subdivision that was not covered under Social Security”
21 may receive an offset against their Social Security benefits, known as a “government pension
22 offset.” Social Security Handbook § 1836.1. However, there are a variety of exceptions to the
23 GPO. *See id.* § 1836.4.

24 If a Social Security claimant is overpaid, 42 U.S.C. § 404(a) allows the Commissioner of
25 Social Security to “require such overpaid person or his estate to refund the amount in excess of
26 the correct amount.” 42 U.S.C. § 404(a)(1)(A). However, § 404(b) provides that such refund
27 may be waived if the person is “without fault” and “if such adjustment or recovery would defeat
28 the purpose of this subchapter or would be against equity and good conscience.” *Id.* § 404(b)(1).

1 The Social Security Administration must “consider all pertinent circumstances” when deciding
2 whether an overpaid claimant is “without fault.” 20 C.F.R. §§ 404.507, 404.510.

3 In *Quinlivan v. Sullivan*, the Ninth Circuit held that the phrase “against equity and good
4 conscience” requires “a broad concept of fairness to apply to waiver requests, one that reflects
5 the ordinary meaning of the statutory language and takes into account the facts and
6 circumstances of each case.” *Quinlivan v. Sullivan*, 916 F.2d 524, 527 (9th Cir. 1990). The
7 Social Security Administration is in the best position to make these determinations, and “it is
8 usually better to minimize the opportunity for reviewing courts to substitute their discretion for
9 that of the agency.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (quoting
10 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014)).

11 The court has conducted a *de novo* review of the limited record before it and comes to the
12 same conclusion that Judge Ferenbach did: Remand is appropriate to allow the Social Security
13 Appeals Council to develop the record and make a new determination. The court does not have
14 sufficient evidence before it to settle any of the three issues in plaintiff’s case. As Judge
15 Ferenbach aptly described:

16 Plaintiff’s case involves the evaluation of work and financial
17 records, a calculation of monetary resources, and an application of
18 the rules and regulations related to government pension offsets. *See*
19 *e.g.* 20 C.F.R. § 404.408a; Program Operation Manual (POMS)
20 GN 02608.100-02608.600. As the fact-finder, the agency can
21 gather any additional evidence to evaluate Plaintiff’s overpayment
22 claim. Plaintiff argues that he did not receive an overpayment
23 notice (Pl.’s Resp. at 12). The agency can review all of Plaintiff’s
24 records to determine if he was not mailed any notices of
25 overpayment.

26 (ECF No. 22 at 4).

27 Plaintiff’s objection to Judge Ferenbach’s R&R fundamentally relies on two arguments.
28 First, plaintiff contends that sentence four of 42 U.S.C. § 405(g) “do[es] not empower the court
to grant the Commissioner an ‘involuntary’ voluntary remand.” (ECF No. 26 at 5).² Second,

² Plaintiff makes the same argument regarding sentence six, but neither defendant nor Judge Ferenbach relied on that sentence. (*See* ECF Nos. 22; 26; 27). Accordingly, the court will address only sentence four.

1 plaintiff argues that “the remedy suggested in the [R&R] is fundamentally unfair and a violation
2 of due process.” *Id.* at 14–17.

3 Sentence four of 42 U.S.C. § 405(g) provides that “[t]he court shall have power to enter,
4 upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing
5 the decision of the Commissioner of Social Security, with or without remanding the cause for a
6 rehearing.” 42 U.S.C. § 405(g). The Supreme Court has clarified as follows:

7 It is evident from these passages that Congress believed courts
8 were often remanding Social Security cases without good reason.
9 While normally courts have inherent power, among other things,
10 to remand cases, see *United States v. Jones*, 336 U.S. 641, 671
11 (1949), both the structure of § 405(g), as amended, and the
12 accompanying legislative history show Congress' clear intent to
13 limit courts to two kinds of remands in these cases. *Cf. Chambers*
14 *v. NASCO, Inc.*, 501 U.S. 32 (1991) (finding no congressional
15 intent to limit a court's inherent authority to impose sanctions).

16 In light of the foregoing, we conclude that in § 405(g)
17 actions, remand orders must either accompany a final judgment
18 affirming, modifying, or reversing the administrative decision in
19 accordance with sentence four, or conform with the requirements
20 outlined by Congress in sentence six. Construing remand orders in
21 this manner harmonizes the remand provisions of § 405(g) with the
22 EAJA requirement that a “final judgment” be entered in the civil
23 action in order to trigger the EAJA filing period. 28 U.S.C. §
24 2412(d)(1)(B). In sentence four cases, the filing period begins after
25 the final judgment (“affirming, modifying, or reversing”) is entered
26 by the court and the appeal period has run, so that the judgment is
27 no longer appealable. See § 2412(d)(2)(G). In sentence six cases,
28 the filing period does not begin until after the postremand
proceedings are completed, the Secretary returns to court, the court
enters a final judgment, and the appeal period runs.

29 *Melkonyan v. Sullivan*, 501 U.S. 89, 101–02 (1991).

30 The court finds that remand is appropriate in light of the “modification” proposed by
31 Judge Ferenbach: “On remand, the Appeals Council should re-evaluate, and gather any evidence
32 as necessary, to determine whether Plaintiff was at fault in light of his argument that he relied on
33 statements from Social Security employees about the nature of his payments (AR 52).” (ECF
34 No. 22 at 4).

35 Plaintiff's second argument claims that the process for appealing Social Security
36 decisions violates due process because administrative law judges and appeals councils are

1 overworked and frequently come to erroneous decisions. (ECF No. 26 at 14–17). Plaintiff does
2 not cite any legal authority to show that the decision-making and review processes for the Social
3 Security Administration are unconstitutional or violative of due process.

4 Thus, remanding the instant action to the Social Security Administration to fully develop
5 the factual record—with the modification that plaintiff be entitled to present evidence regarding
6 his reliance on statements from Social Security employees and the appeals council shall consider
7 such reliance in making a new determination—is both constitutional and the most prudent course
8 of action for the court.

9 **IV. Conclusion**

10 Accordingly,

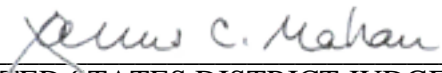
11 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Judge Ferenbach’s R&R
12 (ECF No. 22) be, and the same hereby is, ADOPTED.

13 IT IS FURTHER ORDERED that plaintiff’s motion for reversal (ECF No. 17) be, and
14 the same hereby is, DENIED.

15 IT IS FURTHER ORDERED that defendant’s motion for remand (ECF No. 13) be,
16 and the same hereby is, GRANTED.

17 IT IS FURTHER ORDERED that the matter of *Miskey v. Berryhill*, case number 2:19-
18 cv-00027-JCM-VCF, be, and the same hereby is, REMANDED to the Social Security
19 Administration for further administrative proceedings consistent with this order and Judge
20 Ferenbach’s R&R.

21 DATED March 16, 2020.

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24 UNITED STATES DISTRICT JUDGE
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